

**TCEQ DOCKET NO. 2011-0272-WR**

APPLICATION BY	§	BEFORE THE
Veolia ES Technical	§	
Solutions, LLC for a	§	TEXAS
Temporary Water	§	COMMISSION
Use Permit pursuant	§	
to Texas Water Code	§	ON
§11.138 in Jefferson	§	
County; Application	§	ENVIRONMENTAL
No. 12445	§	QUALITY

**THE EXECUTIVE DIRECTOR'S RESPONSE  
TO HEARING REQUESTS**

The Executive Director of the Texas Commission on Environmental Quality (TCEQ or Commission) files this response to a hearing request for Veolia ES Technical Solutions, LLC's (Veolia or Applicant) application for a temporary water use permit in Jefferson County. The Executive Director recommends denial of the hearing request.

**PROCEDURAL HISTORY**

The Executive Director received an application from Applicant seeking a temporary water use permit pursuant to Texas Water Code §11.138 and Texas Commission on Environmental Quality Rules 30 Texas Administrative Code §§295.1, et seq on March 27, 2009. The application was declared administratively complete and was filed with the Office of the Chief Clerk on July 16, 2009. The notice of the application was filed with the Chief Clerk on November 13, 2009, and notice was subsequently mailed to the five downstream water right holders of record in the Neches-Trinity Coastal Basin. A single request for a hearing was timely received on December 2, 2009. An environmental technical review was completed and memorandum issued on November 24, 2009. A hydrology review was completed and memorandum issued on January 25, 2010. A draft permit was issued on May 26, 2010.

**THE APPLICATION**

Veolia applied for a temporary water use permit to divert and use 2,000 acre-feet of water for a one year period. Staff has recommended the granting of Temporary Water Use Permit No. 12445 which would authorize Applicant to divert and use not to exceed 1,400 acre-feet of water at a maximum combined diversion rate of 6.684 cfs (3,000 gpm) within a period of one year from two diversion points on an unnamed tributary of Fish Box Gully, tributary of Taylor

Bayou, Neches-Trinity Coastal Basin, for industrial and domestic purposes in Jefferson County.

### LEGAL AUTHORITY

The application is subject to the procedures for evaluating hearing requests on applications declared administratively complete on or after September 1, 1999 in 30 Texas Administrative Code, Chapter 55, Subchapter G (Sections 55.250-55.256).

Title 30, Sections 55.251 (b) and (c) of the Texas Administrative Code specify that a hearing request must:

- (1) be in writing and be filed with the Office of the Chief Clerk during the public comment period;
- (2) give the name, address, and daytime telephone number of the person who files the request;
- (3) identify the person's personal justiciable interest affected by the application including a brief, but specific, written statement explaining in plain language the requestor's location and distance relative to the activity that is the subject of the application and how and why the requestor believes he or she will be affected by the activity in a manner not common to members of the general public; and
- (4) request a contested case hearing.

A hearing request must comply with requirement (1) above and must "substantially comply" with requirements (2) through (4). 30 Tex. Admin. Code § 55.251(c).

A request for a contested case hearing must be granted if the request is made by an affected person and the request:

- (A) complies with the requirements of 30 Tex. Admin. Code § 55.251;
- (B) is timely filed; and
- (C) is pursuant to a right to hearing authorized by law.

30 Tex. Admin. Code § 55.255(b)(2).

An "affected person" is one who has a personal justiciable interest related to a legal right, duty, privilege, power, or economic interest affected by the application. An interest common to the general public does not constitute a justiciable interest. 30 Tex. Admin. Code § 55.256(a).

To determine whether a person is an affected person, all relevant factors must be considered, including but not limited to:

- (1) whether the interest claimed is one protected by the law under which the

- application will be considered;
- (2) distance restrictions or other limitations imposed by law on the affected interest;
- (3) whether a reasonable relationship exists between the interest claimed and the activity regulated;
- (4) the likely impact of the regulated activity on the health, safety, and use of property of the person;
- (5) the likely impact of the regulated activity on the use of the impacted natural resource by the person; and
- (6) for governmental entities, their statutory authority over or interest in the issues relevant to the application.

30 Tex. Admin. Code § 55.256(c).

## DISCUSSION OF HEARING REQUESTS

### *The hearing request is deficient*

The Commission received one timely hearing request from Mr. Roy R. Petersen. Mr. Petersen is not one of the five downstream water right holders of record in the TCEQ database, but is on the interested person list at the Chief Clerk's office for the basin.

Mr. Petersen's request complies with the requirements sections 1, 2, and 4 in 30 Tex. Admin. Code § 55.251(b) and (c), however, Mr. Petersen has failed to "comply" or "substantially comply" with the requirement to identify his personal justiciable interest not common to the general public, pursuant to section 3 of that provision, therefore his request should be denied. It is unclear what personal justiciable interest Mr. Petersen is claiming. For water rights applications, that interest is typically a water right that may be affected by the application. Mr. Petersen did not name a water right for which he has ownership rights, nor has he made any claims for riparian rights. Instead, he states that the Applicant will divert "high quality fresh surface spring water . . . from an unnamed slough for the purpose of flushing polluted water." He also requests that TCEQ ensure that his "wetland marsh and surface water spring wildlife nursery" are restored. Therefore, his interest appears to arise from his property interest in the marshland that is in the vicinity of the reservoir where the proposed diversions will occur. Mr. Petersen could not provide a physical address for his property nor did he provide a map showing his property. Program staff made unusual efforts to approximate the location of his marshland using Mr. Petersen's statements in the hearing request and by searching the county tax appraisal records. However, staff was only able to approximate the location of his parcel as shown on the map attached as Exhibit A. Even assuming the Commission assumes that Mr. Petersen is a downstream property holder, he has still failed to identify a water right or to claim riparian water rights that would be affected. Under Tex. Water Code § 11.303(l) and 30 Tex. Admin. Code § 297.21(a), landowners along a river have the

right to use the normal flow of the river for domestic and livestock uses.

30 Tex. Admin. Code § 297.118 defines “domestic” use as:

Use of water by an individual or a household to support domestic activity. Such use may include water for drinking, washing, or culinary purposes; for irrigation of lawns, or of a family garden and/or orchard; for watering of domestic animals; and for water recreation including aquatic and wildlife enjoyment. If the water is diverted, it must be diverted solely through the efforts of the user. Domestic use does not include water used to support activities for which consideration is given or received or for which the product of the activity is sold.

Mr. Petersen does not state that he diverts water from the tributary for domestic purposes. He mentions fresh spring water, but never fully explains from where the spring water emanates and to where it flows or even that he specifically diverts the water to make use of it domestically. Therefore, though Mr. Petersen appears to have a property interest in marshland that is in the immediate vicinity of the proposed diversion, Mr. Petersen’s request is deficient with respect to the requirements of 30 Tex. Admin. Code § 55.251 because it does not clearly identify where the property is relative to the proposed diversion or state specifically how the proposed diversion would affect the property in a manner different from the general public.

*Even if the hearing request were found sufficient, the requestor has failed to demonstrate that he is an affected person pursuant to 30 Tex. Admin. Code § 55.256*

As stated previously, Mr. Petersen’s request fails to substantially comply with the requirement to identify a personal justiciable interest and show how his interest is affected in a manner that is not common to the general public. If the Commission were to make broad inferences from his request the Commission might conclude that his “personal justiciable interest” appears to be that the diversions will cause or exacerbate harm to his use and enjoyment of his property, specifically the wetland marsh. Even making such allowances in Mr. Petersen’s favor will not be sufficient to demonstrate that Mr. Petersen is an “affected person” pursuant to the factors enumerated in 30 Tex. Admin. Code § 55.256 if examined in total.

The first factor in section 55.256 is “whether the interest claimed is one protected by the law under which the application will be considered.” Mr. Petersen’s use and enjoyment of his property would be an interest that is not common to members of the general public assuming the commission finds his statements regarding his property ownership sufficient to show a relationship between the proposed activity and harm to this property interest.

Under the second factor, the Commission must consider “distance restrictions or

other limitations imposed by law on the affected interest.” Generally for this type of temporary water right application, to receive notice of the application one must be a water right holder of record downstream from the proposed diversions and be affected in the judgment of the Commission. 30 Tex. Admin. Code § 295.154. As stated previously, Mr. Petersen’s request fails to provide a water right for the Commission to consider, to clearly identify the location of the property, nor even explain how the proposed diversions will cause the harm the request describes. It is not clear from the information available that Mr. Petersen’s property is “downstream” from the proposed diversions and a careful reading of the request shows no explicit statement that his property is downstream. There does not appear to be any restrictions other than the requester must be downstream, except the Commission has discretion to decide at what point the distance downstream from the proposed diversion becomes so great that the proposed activity could not cause any harm to a water right holder. Without more specific information regarding the location of Mr. Petersen’s property and whether the property is downstream, the Executive Director cannot determine whether the request is limited by this factor.

The third factor for consideration is “whether a reasonable relationship exists between the interest claimed and the activity regulated.” The request does not provide the Commission with sufficient information to make a conclusion with respect to this factor. It is unclear what the “interest claimed” is, therefore it is even more difficult to ascertain whether there is a relationship to the proposed diversions. Even if the Commission makes broad allowances for the deficiencies with respect to the hearing request and makes assumptions that the request refers to a property interest in marshland, it is impossible to draw conclusions about how the proposed diversions are related to the claimed interest. The closest the request comes to resolving this question are the statements that the Applicant will divert “high quality fresh surface spring water . . . from an unnamed slough for the purpose of flushing polluted water” and Mr. Petersen’s request that TCEQ ensure that his “wetland marsh and surface water spring wildlife nursery” be restored. Therefore, the requester appears to be claiming that the proposed diversions will somehow be harmful to wetland marsh on property that he owns, but never sufficiently explains how the proposed diversions relate to the harm he alleges has occurred or will occur to wildlife on his property.

The fourth factor is “the likely impact of the regulated activity on the health, safety, and use of property of the person.” Harm to the environment and wildlife habitat is generally within the scope of the Commission’s review of this water right permit as evidenced by the fact that an environmental review was conducted for this application. See Sections 11.150 and 11.152 of the Texas Water Code. The Executive Director performed an assessment of how the proposed temporary permit would generally affect the environment downstream; including: effects on water quality, effects on the bays and estuaries, and effects to wildlife and habitat. Staff does not have sufficient information to determine whether the property is downstream or how the proposed diversion would

specifically affect wildlife or habitat on Mr. Petersen's property. However, staff concluded that such a small diversion over a period of one year or less would not cause significant impacts to any of these environmental concerns anywhere downstream from the proposed diversions. The Executive Director considered that the water will be used on a temporary basis for flushing saltwater that intruded into Veolia's freshwater reservoir during the most recent hurricane. The scope of review of this application is the proposed diversions and flushing of saltwater downstream and not water pollution on neighboring property or spills resulting from the improper use of the water. Such issues would potentially be subject to a water quality review or to enforcement actions if there were unlawful discharges. As was stated earlier, staff's review of the effects this temporary diversion would have on water quality downstream were minimal. Further, staff found that the flushing of saltwater from the reservoir would be a benefit to the water quality and habitat in the reservoir.

The final factor relevant to this affected person determination is "the likely impact of the regulated activity on the use of the impacted natural resource by the person." The request never states that Mr. Petersen uses or diverts the "impacted natural resource", that is that he diverts water for use. Regardless, in addition to the environmental review conducted above relating to water quality which could impact the use of water downstream, the Executive Director also conducted a water availability analysis to determine whether the water requested by the applicant is available on a temporary basis. To be protective of downstream water rights, the Executive Director proposed reducing the requested authorization from 2,000 acre feet to 1,400 acre feet. If Mr. Petersen would like to request a diversion of water, he would be subject to the same availability analysis.

Considering all of the factors in total, Mr. Petersen's request fails to adequately show that he is an "affected person" under the requirements of 30 Tex. Admin. Code § 55.256. Specifically, the request does not clearly identify the location of his property or explain how his property interest would be directly harmed in a manner different from the general public or in a way that is part of the review for this type of application. Further, the Executive Director's review found there would be minimal, if any, adverse affects to the environment, water quality, or to the bays and estuaries caused by this relatively small and temporary water diversion. Therefore the Executive Director respectfully requests that the Commission deny the request for a hearing.

## CONCLUSION

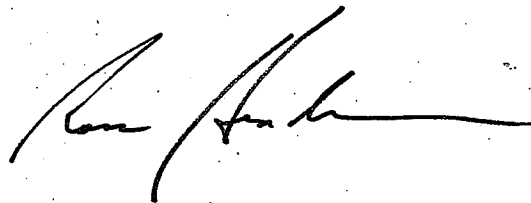
For the foregoing reasons, the Executive Director respectfully recommends that the Commission deny Mr. Petersen's request for a hearing.

Respectfully submitted,

Texas Commission on Environmental  
Quality

Mark R. Vickery, P.G.  
Executive Director

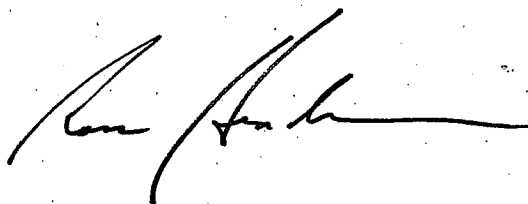
Robert Martinez, Director  
Environmental Law Division

A handwritten signature in black ink, appearing to read "Ross Henderson", is written over a horizontal line.

Ross Henderson, Attorney  
Environmental Law Division  
State Bar No. 24046055  
P.O. Box 13087, MC 173  
Austin, Texas 78711-3087  
(512) 239-0600  
REPRESENTING THE  
EXECUTIVE DIRECTOR OF THE  
TEXAS COMMISSION ON  
ENVIRONMENTAL QUALITY

### **CERTIFICATE OF SERVICE**

I hereby certify that on March 28, 2011, the Executive Director's Response to Hearing Request was filed with the Texas Commission on Environmental Quality's Office of the Chief Clerk and was served via hand delivery, facsimile transmission, email, or by first class mail to all the parties on the mailing list.

A handwritten signature in black ink, appearing to read "Ross Henderson", written over a horizontal line.

Ross Henderson  
Environmental Law Attorney



**MAILING LIST**  
**VEOLIA ES TECHNICAL SOLUTIONS L.L.C.**  
**DOCKET NO. 2011-0272-WR; WRTP 12445**

FOR THE APPLICANT:

Duncan Daniel  
Veolia ES Technical Solutions L.L.C.  
P.O. Box 2653  
Port Arthur, Texas 77643-2653  
Tel: (409) 736-4146  
Fax: (409) 736-4197

FOR THE EXECUTIVE DIRECTOR:  
via electronic mail:

Todd Galiga, Staff Attorney  
Texas Commission on Environmental  
Quality  
Environmental Law Division, MC-173  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-0600  
Fax: (512) 239-0606

Iliana Marie Delgado, Technical Staff  
Michael Gill, Technical Staff  
Texas Commission on Environmental  
Quality  
Water Supply Division, MC-160  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-3678  
Fax: (512) 239-2214

FOR PUBLIC INTEREST COUNSEL:  
via electronic mail:

Mr. Blas J. Coy, Jr., Attorney  
Texas Commission on Environmental  
Quality  
Public Interest Counsel, MC-103  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-6363  
Fax: (512) 239-6377

FOR OFFICE OF PUBLIC  
ASSISTANCE:

via electronic mail:

Ms. Bridget Bohac, Director  
Texas Commission on Environmental  
Quality  
Office of Public Assistance, MC-108  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4000  
Fax: (512) 239-4007

FOR ALTERNATIVE DISPUTE  
RESOLUTION

via electronic mail:

Mr. Kyle Lucas  
Texas Commission on Environmental  
Quality  
Alternative Dispute Resolution, MC-222  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-4010  
Fax: (512) 239-4015

FOR THE CHIEF CLERK:

Ms. LaDonna Castañuela  
Texas Commission on Environmental  
Quality  
Office of Chief Clerk, MC-105  
P.O. Box 13087  
Austin, Texas 78711-3087  
Tel: (512) 239-3300  
Fax: (512) 239-3311

REQUESTER(S):

Roy R. Petersen  
515 Roland Ln.  
Kyle, Texas 78640-5620

● Veolia E.S. Technical Solutions, LLC  
Application No. 12445

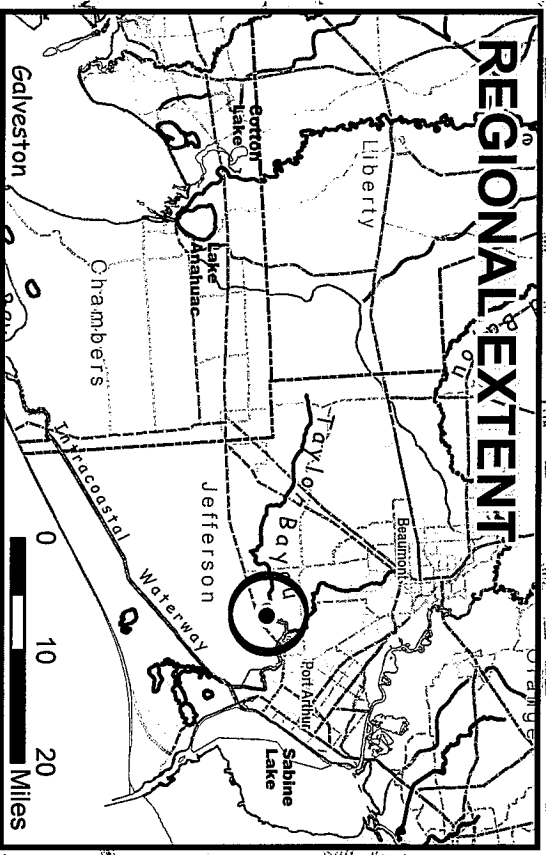
▲ Protestant - Approximate Location

12445      12445 - Diversion Point No. 2

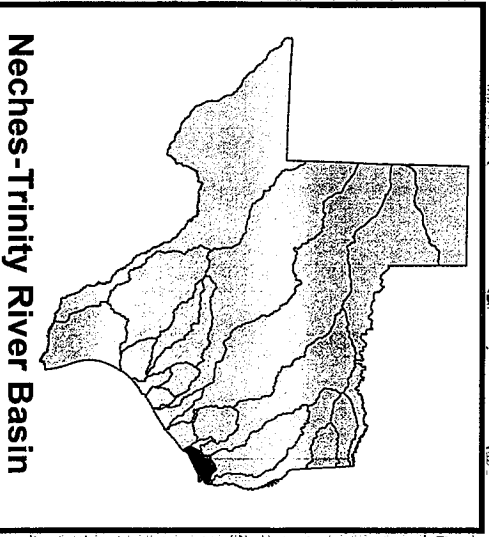
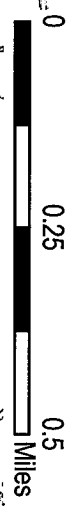
Diversion Point No. 1

\* Diversion is also authorized at this location by certificate 07-4479

**REGIONAL EXTENT**



tabbles®  
**EXHIBIT**  
**A**



**Neches-Trinity River Basin**